Software Rights Archive, LLC v. Google Inc. et al Doc. 19

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

"THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION."	C-05-0037-JW
	DECEMBER 16, 2008
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THE PROCEEDINGS WERE HELD BEFORE

THE HONORABLE UNITED STATES DISTRICT

JUDGE JAMES WARE

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(APPEARANCES CONTINUED ON THE NEXT PAGE.)

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SAN JOSE, CALIFORNIA DECEMBER 16, 2008

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: CALLING CASE NUMBER 05-0037, THE APPLE IPOD ITUNES ANTITRUST LITIGATION.

ON FOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

TWENTY MINUTES EACH SIDE.

COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

MS. SWEENEY: GOOD MORNING. BONNY SWEENEY FOR THE DIRECT PURCHASER PLAINTIFFS.

WITH ME IS PAULA ROACH ALSO OF MY OFFICE, FRANK BALINT, AND MICHAEL BRAUN.

MR. MITTELSTAEDT: GOOD MORNING, YOUR HONOR. BOB MITTELSTAEDT FOR APPLE AND WITH ME IS CARLYN CLAUSE FOR APPLE.

THE COURT: VERY WELL. MS. SWEENEY, YOUR MOTION.

MS. SWEENEY: THANK YOU, YOUR HONOR. THE DIRECT PURCHASER PLAINTIFFS ROSEN, TUCKER, AND CHAROENSAK SEEK CLARIFICATION OF A CLASS OF ALL PEOPLE IN THE UNITED STATES WHO PURCHASED IPODS

DIRECTLY FROM APPLE BETWEEN APRIL 2003 AND THE PRESENT.

IN THIS CASE, AS YOUR HONOR IS AWARE BECAUSE THE COURT HAS RULED ALREADY ON TWO MOTIONS TO DISMISS, PLAINTIFFS SEEK DAMAGES AND INJUNCTIVE RELIEF FOR APPLE'S UNLAWFUL TYING CONDUCT AND ITS UNLAWFUL MONOPOLIZATION.

PLAINTIFFS CLAIM THAT APPLE UNLAWFULLY TIED THE IPOD TO THE DIGITAL DOWNLOADS THAT ARE PURCHASED THROUGH THE ITUNES STORE BOTH VIDEO AND MUSIC.

PLAINTIFFS ALSO CLAIM THAT APPLE UNLAWFULLY MONOPOLIZED OR ATTEMPTED TO MONOPOLIZE ALL THREE MARKETS; THAT IS, THE DIGITAL PORTABLE PLAYER MARKET, THE DIGITAL VIDEO DOWNLOAD MARKET, AND THE DIGITAL MUSIC DOWNLOAD MARKET.

IN OUR PAPERS, YOUR HONOR, PLAINTIFFS SHOWED THAT ALL OF THE REQUIREMENTS OF RULE 23(A) ARE SATISFIED AND IN ADDITION THAT A CLASS IS PROPERLY CERTIFIED UNDER BOTH RULES 23(B)(2) FOR INJUNCTIVE RELIEF AND 23(B)(3) FOR DAMAGES.

WE ALSO SUBMITTED AN EXPERT REPORT FROM PROFESSOR NOLL OF STANFORD UNIVERSITY. PROFESSOR NOLL IS AN ECONOMIST WHO HAS BEEN VERY ACTIVE IN THE FIELD FOR MORE THAN 40 YEARS. HE'S PUBLISHED

MORE THAN 13 BOOKS, MORE THAN 300 ARTICLES, AND HE SUBMITTED AN OPINION IN WHICH HE CONCLUDED THAT USING THE KINDS OF TOOLS THAT THE ECONOMISTS USE, PLAINTIFFS SHOULD BE ABLE TO PROVE USING COMMON PROOF BOTH COMMON IMPACT THAT EACH MEMBER OF THE PROPOSED CLASS SUFFERED ANTITRUST DAMAGES, AND ALSO PROFESSOR NOLL PROPOUNDED THREE ALTERNATIVE DAMAGES METHODOLOGIES THAT CAN BE USED TO SHOW DAMAGES TO THE CLASS.

ALL THREE OF THESE METHODOLOGIES HAVE BEEN ADOPTED BY COURTS IN NUMEROUS OTHER ANTITRUST CASES, INCLUDING MOST RECENTLY JUDGE HAMILTON AND JUDGE WILKINS BOTH OF THE NORTHERN DISTRICT CERTIFIED THE DRAM CLASS AND THE SRAM CLASS IN RELIANCE ON EXPERT NOLL'S EXPERT REPORT.

NOTABLY APPLE DID NOT SUBMIT ANY EXPERT TESTIMONY TO CHALLENGE PROFESSOR NOLL'S CONCLUSIONS.

THERE IS JUST ONE UNCHALLENGED EXPERT REPORT IN THIS CASE, YOUR HONOR, AND IT IS PLAINTIFFS' EXPERT PROFESSOR NOLL.

IN OUR OPENING BRIEF AND IN OUR REPLY BRIEF, PLAINTIFFS DEMONSTRATED THAT EACH ELEMENT OF THEIR CLAIMS, THEIR ANTITRUST CLAIMS, CAN BE PROVEN WITH COMMON PROOF.

AS TO THE TYING CLAIM, THE ELEMENTS ARE FAIRLY STRAIGHTFORWARD. YOU HAVE TO PROVE THAT THEY'RE SEPARATE PRODUCTS.

APPLE HAS CONCEDED THAT THEY'RE SEPARATE PRODUCTS SO THERE'S NO QUESTION THAT THAT PROOF WILL BE COMMON.

IN ADDITION, PLAINTIFFS HAVE TO SHOW THAT APPLE HAS SOME MEASURE, NOT NECESSARILY MONOPOLY POWER, BUT SOME MEASURE IN THE TYING MARKET. THAT IS THE TYING PRODUCT MARKET IS THE MARKET FOR DIGITAL DOWNLOADS.

AND THAT, AS PROFESSOR NOLL OPINED IN HIS MANY COURTS HAVE HELD, THE QUESTION OF THE APPROPRIATE DEFINITION OF THE MARKET AND WHETHER THE DEFENDANT HAS MARKET POWER, THOSE ISSUES ARE BOTH SUSCEPTIBLE OF ESTABLISHING THROUGH COMMON PROOF, NOT THROUGH INDIVIDUAL PROOF.

PLAINTIFFS ALSO HAVE TO SHOW THAT APPLE'S CONDUCT HAD NOT INSUBSTANTIAL EFFECT ON COMMERCE IN THE TIED PRODUCT MARKET.

NOW, THIS IS A VERY DE MINIMUS TEST AND WE EXPECT THAT APPLE WILL CONCEDE THAT POINT.

THE ONLY APPLE ARGUMENT IN OPPOSITION TO PLAINTIFFS' MOTION IS COERCION. THIS IS THE ONLY ARGUMENT THAT APPLE MAKES TO ARGUE THAT THE CLASS

SHOULD NOT BE CERTIFIED.

AND THE PROBLEM WITH APPLE'S COERCION ARGUMENT, YOUR HONOR, IS THAT IT IS ONE THAT HAS ALREADY BEEN REJECTED BY THIS COURT TWICE IN DENYING APPLE'S TWO MOTIONS TO DISMISS.

IT HAS ALSO BEEN REJECTED BY THE NINTH CIRCUIT.

APPLE ARGUES THAT EVEN THOUGH THE TIE, THAT IS THE RESTRICTION ON ITUNES THAT PREVENTS DIGITAL DOWNLOADS, BOTH VIDEO AND MUSIC, FROM PLAYING DIRECTLY ON ANY PORTABLE PLAYER OTHER THAN THE IPOD, EVEN THOUGH THAT RESTRICTION IS PRESENT IN EACH AND EVERY DOWNLOAD, AND EACH AND EVERY IPOD, THAT YOU HAVE TO TAKE INDIVIDUAL TESTIMONY TO DETERMINE WHETHER ANY INDIVIDUAL MEMBER OF THE CLASS WOULD HAVE PURCHASED THE TIED PRODUCT BUT FOR THE TIE.

BUT THAT'S NOT WHAT THE LAW REQUIRES.

AS YOUR HONOR RECOGNIZED IN DENYING APPLE'S TWO MOTIONS TO DISMISS, BOTH IN THE SLATTERY CASE AND IN THE TUCKER CASE, IN THE NINTH CIRCUIT THE COURT IS NOT REQUIRED TO OR THE PLAINTIFF IS NOT REQUIRED TO DEMONSTRATE ACTUAL COERCION.

RATHER, THE PLAINTIFF IS REQUIRED TO

DEMONSTRATE MARKET LEVEL COERCION AND THE NINTH CIRCUIT HELD IN THE CASE OF MOORE VERSUS JASON MATTHEWS THAT COERCION MAY BE IMPLIED FROM A SHOWING THAT AN APPRECIABLE NUMBER OF BUYERS HAVE ACCEPTED BURDENSOME TERMS. AN APPRECIABLE NUMBER OF BUYERS.

SO PLAINTIFF HAS TO SHOW THAT AN APPRECIABLE NUMBER OF BUYERS OF THE TIED PRODUCT WOULD NOT HAVE PURCHASED THAT PRODUCT BUT FOR THE TIE.

PLAINTIFF DOESN'T HAVE TO SHOW THAT EACH AND EVERY MEMBER OF THE CLASS WOULD HAVE MADE AN IDENTICAL DECISION.

AS PROFESSOR NOLL OPINED IN HIS REPORT AND TESTIFIED AT HIS DISPOSITION, WHAT MATTERS IS THAT THERE IS A SUFFICIENT NUMBER THAT IT ENABLED APPLE TO INCREASE ITS MARKET POWER AND THEREBY INCREASE THE PRICE OF THE TIED PRODUCT THAT IS THE IPOD.

NOW, IN THE MOORE CASE, WHICH I MENTIONED, AND THIS IS 550 F.2D 1207, AND THAT CASE INVOLVED AN ALLEGED TIE BETWEEN THE SALE OF CEMETERY LOTS AND MEMORIAL MARKERS.

NOW, THE FACTS OF THAT CASE WERE THAT THE DEFENDANT OWNED EIGHT OF THESE CEMETERIES. ONLY

FIVE OF THOSE CEMETERIES ACTUALLY REQUIRED THAT A PERSON WHO WANTED TO PURCHASE A CEMETERY LOT ALSO PURCHASED A MARKER.

THE NINTH CIRCUIT HELD THAT THAT WAS SUFFICIENT. AND THE NINTH CIRCUIT SAID THAT RELYING UPON THE LEADING SUPREME COURT TYING CASES, THE COURT SAID THE NINTH CIRCUIT, OUR READING OF THE SUPREME COURT'S OPINIONS SUPPORTS THE VIEW THAT COERCION MAY BE IMPLIED FROM A SHOWING THAT AN APPRECIABLE NUMBER OF BUYERS HAVE ACCEPTED BURDENSOME TERMS SUCH AS THE TYING PRODUCT MARKET.

COERCION OCCURS WHEN THE BUYER MUST ACCEPT THE TIED ITEM AND FOREGO POSSIBLY DESIRABLE SUBSTITUTES.

WE ALSO CITED A NUMBER OF OTHER CASES SUPPORTING THE POINT MADE BY THE NINTH CIRCUIT IN MOORE. FOR EXAMPLE, THE BAFUS CASE, WHICH WE CITE IN OUR PAPERS, YOUR HONOR, CERTIFIED A CLASS ON THE BASIS THAT THERE WAS AN APPRECIABLE NUMBER OF BUYERS WHO WERE INFLUENCED BY THE TIE RATHER THAN AN ABSOLUTE REQUIREMENT THAT EACH AND EVERY MEMBER OF THE PROPOSED CLASS WAS BOUND BY THE TIE.

APPLE ALSO MAKES THE ARGUMENT THAT THE TYING CLAIM CAN'T BE CERTIFIED BECAUSE OF WHAT IT REFERS TO AS THE PACKAGE THEORY OF DAMAGES.

APPLE RELIES ON AN ELEVENTH CIRCUIT CASE WHICH CITES THE NINTH CIRCUIT'S SIEGLE CASE FOR THE PROPOSITION THAT, WELL, IN SOME CASES A TIE ACTUALLY REDUCES -- HAS THE EFFECT IT MAY INCREASE THE PRICE OF THE TIED PRODUCT, BUT IT HAS THE EFFECT OF REDUCING THE PRICE OF THE TYING PRODUCT.

IN OTHER WORDS, APPLE SAYS HERE YOU HAVE TO DETERMINE WHETHER THE ITUNES VIDEO AND DIGITAL DOWNLOADS WAS DECREASED AS A RESULT OF THE TIE.

WELL, THAT ISN'T REALLY A CORRECT STATEMENT OF THE LAW IN THE NINTH CIRCUIT.

THE SIEGLE CASE INVOLVED THE CLASS. THE NINTH CIRCUIT DID NOT OVERTURN THE CLASS DECISION NOR DID THE NINTH CIRCUIT OVERTURN THE LIABILITY JUDGMENT IN FAVOR OF THE PLAINTIFFS. RATHER, THE NINTH CIRCUIT SAID THAT YOU HAVE TO TAKE THIS INTO ACCOUNT IN CALCULATING THE AMOUNT OF DAMAGES.

SO IT IS MERELY A DAMAGES QUESTION AND AS BLACKIE AND MANY OTHER NINTH CIRCUIT AND MANY OTHER NORTHERN CALIFORNIA CASES HAVE HELD, EVEN IF THERE ARE DAMAGES ISSUES, THAT DOES NOT PRECLUDE CERTIFICATION OF A CLASS.

NOW, MOREOVER, THE SIEGLE CASE WAS A LITTLE UNUSUAL BECAUSE THERE THERE WAS NO PRICE FOR THE ALLEGED TYING PRODUCT. THE SO-CALLED TYING

PRODUCT WAS THE USE OF THE TRADEMARK NAME CHICKEN DELIGHT WHICH APPARENTLY HAD VALUE IN THE MARKET.

HERE, OF COURSE, PLAINTIFFS AND MEMBERS OF THE CLASS PAID MONEY FOR THEIR ITUNES DIGITAL VIDEO AND MUSIC DOWNLOADS.

WE ALSO HAVE A CLAIM FOR MONOPOLIZATION BOTH FOR ATTEMPTED MONOPOLIZATION AND MONOPOLY MAINTENANCE OR CREATION.

NOW, APPLE DOESN'T REALLY ADDRESS THIS ARGUMENT AT ALL IN THEIR PAPERS. APPLE MERELY SAYS THAT IT'S BASED ON OUR TYING THEORY, AND, THEREFORE, IT FAILS FOR THE SAME REASONS.

WELL, IN FACT, PLAINTIFFS HAVE ALLEGED A MONOPOLIZATION CLAIM THAT DON'T RELY SOLELY ON THEIR TYING CLAIMS.

THERE ARE SEVERAL DIFFERENT ASPECTS OF APPLE'S CONDUCT THAT PLAINTIFFS CONTEND ARE AND WERE ANTICOMPETITIVE.

AND AS WE EXPLAINED IN OUR PAPERS, ALL OF THE ELEMENTS OF THE PLAINTIFFS' MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION CLAIMS WILL BE PROVEN RELYING ON EVIDENCE THAT IS COMMON TO THE CLASS BECAUSE IT IS PRINCIPALLY, IF NOT ENTIRELY, EVIDENCE THAT IS IN THE HANDS OF APPLE.

FIRST THE PLAINTIFF HAS TO SHOW THAT

APPLE HAS MARKET POWER IN THE PROPERLY DEFINED MARKET. AND AGAIN WE ALLEGE THREE MONOPOLY MARKETS.

AND THEN THE PLAINTIFFS HAVE TO SHOW THAT APPLE ACQUIRED OR MAINTAINED THAT MONOPOLY THROUGH WILLFUL OR ANTICOMPETITIVE CONDUCT.

AND THE ANTICOMPETITIVE CONDUCT THAT IS OUTLINED IN OUR PAPERS AND IN THE AMENDED COMPLAINT IS, ONE, THE ENCRYPTION THAT WE COMPLAIN ABOUT, NAMELY, THAT APPLE ENCRYPTS THE DIGITAL DOWNLOADS WITH IT'S OWN PROPRIETARY DRM, THEREBY PREVENTING DIRECT PLAYBACK ON ANY PORTABLE PLAYER OTHER THAN THE IPOD.

IN ADDITION, APPLE HAS TAKEN STEPS THROUGHOUT THE CLASS PERIOD TO PRECLUDE ENTRY BY WOULD BE COMPETITORS. WHEN A COMPETITOR FIGURED OUT HOW TO PLAY ITUNES MUSIC ON ITS COMPETING PORTABLE PLAYER, APPLE PROMPTLY ISSUED A SOFTWARE FIX THAT PREVENTED THAT.

APPLE COULD HAVE LICENSED ITS PROPRIETARY DRM ENCRYPTION TO OTHERS. IT COULD HAVE PURCHASED A LICENSE TO OTHERS FOR ANOTHER ENCRYPTION METHODOLOGY. IT COULD HAVE USED A NONPROPRIETARY ENCRYPTION. THERE ARE ALL SORTS OF WAYS IN WHICH APPLE'S CONDUCT WAS DESIGNED TO -- INTENDED TO AND

HAD THE EFFECT OF PRECLUDING ENTRY INTO THE MARKET AND MAINTAINING ITS OWN MONOPOLY IN ALL THREE MARKETS.

THE COURT: NOW, HAVE I PREVIOUSLY RULED IN ANY WAY THAT THEIR USE OF THEIR OWN DRM IS WILLFUL CONDUCT THAT WOULD SUPPORT A MONOPOLY CLAIM?

MS. SWEENEY: YOUR HONOR IN THE RULINGS ON THE MOTION TO DISMISS RECOGNIZED THE PLAINTIFFS' ALLEGED NUMEROUS WAYS IN WHICH APPLE COULD HAVE AVOIDED THE TIE AND AVOIDED -- AND YOUR HONOR DID NOT SPECIFICALLY RULE THAT USING ITS OWN DRM WAS ANTICOMPETITIVE OR WILLFUL CONDUCT.

SO THAT ISSUE REMAINS TO BE RESOLVED ON A MORE COMPLETE RECORD.

THE COURT: THAT'S THE PART OF THE MONOPOLY AND ATTEMPTED MONOPOLY CLAIM THAT I'M NEEDING MORE HELP FROM THE PARTIES ON AND UNDERSTANDING, BUT I HAVE COME TO THE TENTATIVE CONCLUSION THAT I CAN PROCEED WITH CLASS CERTIFICATION AND LEAVE THIS FOR LATER. I SUPPOSE YOU AGREE WITH THAT?

MS. SWEENEY: YES, YOUR HONOR.

THE COURT: ALL RIGHT. I MIGHT GET A DIFFERENT VIEW FROM YOUR OPPONENT, BUT IT SEEMS TO

ME THAT WHAT I AM BOTHERED BY BY THIS ARGUMENT THAT IT'S WILLFUL CONDUCT IS BECAUSE IT SEEMS TO ME THAT WHAT I UNDERSTAND ABOUT DRM SOFTWARE IS THAT IT'S SOMETHING THAT IS DONE TO PROTECT THE COPYRIGHT OWNER AND THAT ALL DOWNLOAD, SOFTWARE DOWNLOAD DISTRIBUTORS HAVE TO INCORPORATE SOMETHING OF THAT KIND IN THE SOFTWARE.

AND SO IT SEEMS TO ME THAT THE QUESTION THAT I HAVE IN MY MIND IS WHETHER WILLFULNESS MUST BE SOMETHING MORE THAN SIMPLY CHOOSING A PARTICULAR DRM OVER ANOTHER.

AND WHAT I REMEMBER EARLY ON IN THE CASE IS WHAT YOU'RE TELLING ME THAT SOMEHOW THERE WAS A MODIFICATION OF THE DRM IN A WAY THAT WAS ANTICOMPETITIVE, NOT THE PRESENCE OF A DRM.

AND SO I'M TRYING TO MAKE SURE THAT AS I PROCEED I HIGHLIGHT THAT I NEED TO UNDERSTAND THAT ISSUE BETTER. THIS MAY NOT BE THE TIME TO DO IT, BUT IT'S ONE OF THOSE ISSUES THAT I'M STRUGGLING WITH.

MS. SWEENEY: I APPRECIATE THAT, YOUR HONOR. AND PLAINTIFFS' VIEW IS THAT ON THIS RECORD WE HAVEN'T YET HAD ANY MERITS DISCOVERY. WE DON'T HAVE A COMPLETE RECORD. AND WE BELIEVE, OF COURSE, THAT THE EVIDENCE WILL BEAR OUT OUR ALLEGATIONS IN

OUR COMPLAINT THAT THERE ARE SEVERAL DIFFERENT TYPES OF CONDUCT THAT APPLE ENGAGED IN THAT CONSTITUTE WILLFUL AND ANTI-COMPETITIVE CONDUCT.

DID YOUR HONOR WANT ME TO --

THE COURT: NO, GO AHEAD.

MS. SWEENEY: OKAY.

THE COURT: I WAS JUST PAUSING AT THAT POINT BECAUSE THAT IS AN AREA THAT I MARKED FOR MYSELF TO GET A BETTER UNDERSTANDING OF AT SOME APPROPRIATE POINT.

MS. SWEENEY: THANK YOU, YOUR HONOR. AS I MENTIONED BEFORE, PLAINTIFFS' EXPERT PROFESSOR NOLL HAS DESCRIBED THREE PROPOSED METHODOLOGIES FOR CALCULATING DAMAGES. ONE IS THE BEFORE AND AFTER; THE SECOND IS THE YARDSTICK METHOD; AND THE THIRD IS ONE THAT LOOKS AT APPLE'S PROFIT MARGINS, IT'S MARKUPS.

ALL THREE OF THESE METHODS HAVE BEEN RELIED UPON BY COURTS IN OTHER ANTITRUST CASES, INCLUDING IN THE DRAM CASE WHICH WAS A PRICE FIXING CASE; THE SRAM CASE, ANOTHER PRICE FIXING CASE.

THEY ALSO HAVE BEEN ADOPTED BY COURTS THAT HAVE CERTIFIED CLASSES WHERE PLAINTIFFS ALLEGE TYING CLAIMS.

FOR EXAMPLE, THE SECOND CIRCUIT IN THE

VISA CHECK MASTER MONEY LITIGATION CERTIFIED A CLASS OF MERCHANTS -- EXCUSE ME -- WHO CHALLENGED VISA AND MASTER CARD'S TYING OF THE MERCHANT'S ACCEPTANCE OF SIGNATURE DEBIT TO THEIR ACCEPTANCE OF CREDIT CARDS.

IN THAT CASE THE PLAINTIFFS' EXPERT PROFFERED A METHODOLOGY THAT USED THE YARDSTICK METHOD. THE EXPERT COMPARED THE COST OF ACCEPTANCE OF SIGNATURE DEBIT, WHICH IS WHERE YOU HAVE TO SIGN TO USE THE CREDIT CARD AND PIN DEBIT AND THE COURT HELD THAT WAS AN APPROPRIATE METHOD FOR DETERMINING THE OVERCHARGE CAUSED BY THE TIE.

THE BAFUS CASE, WHICH WE CITE IN OUR PAPERS, ALSO RELIES UPON A YARDSTICK METHOD AND THAT ALSO IS A TYING CASE.

APPLE SAYS THAT THE APPROPRIATE METHODOLOGY FOR DETERMINING DAMAGES IN A TYING CASE IS A METHODOLOGY CITED IN THE LESSIG CASE. THAT'S A NINTH CIRCUIT CASE.

BUT AS WE POINT OUT IN OUR PAPERS, THE LESSIG CASE HAS NO ANALYSIS AS TO WHAT KIND OF DAMAGES METHODOLOGY IS APPROPRIATE IN A TYING CASE.

IT MERELY, EXCUSE ME, AFTER TRIAL --

THE COURT: YOU CAN PAUSE AND GET SOME WATER.

MS. SWEENEY: OH, THANK YOU, YOUR HONOR.

IN THE LESSIG CASE THE COURT HELD THAT THE INTRODUCTION BY THE PLAINTIFF OF CERTAIN EVIDENCE REGARDING THE COST OF SUBSTITUTE PRODUCTS WHICH WAS THE ONLY EVIDENCE IN THE RECORD AS TO DAMAGES WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT.

SO WE DON'T THINK THAT THE LESSIG CASE HAS ANY APPLICABILITY. AND I SEE THE LIGHT IS ON, YOUR HONOR, AND I WANT TO RESERVE SOME TIME FOR REBUTTAL SO I'LL CLOSE MY REMARKS NOW. THANK YOU VERY MUCH.

THE COURT: ALL RIGHT. COUNSEL.

MR. MITTELSTAEDT: GOOD MORNING, YOUR HONOR. IT WOULD BE UNPRECEDENTED AND CONTRARY TO PRECEDENT TO CERTIFY THE CLASSES OR THE CLASS REQUESTED BY THE PLAINTIFFS HERE.

IF ANY ONE HAD THE TYING OR MONOPOLIZATION CLAIM THAT THEY ALLEGE, THE ONLY WAY TO PROVE IT WOULD BE BY INDIVIDUAL PROOF. AND THAT'S TRUE BOTH FOR THE ALL IMPORTANT COERCION ELEMENTS AND IT'S ALSO TRUE FOR FACT OF INJURY OR IMPACT.

IN A TYING CASE THE PLAINTIFF COMES INTO COURT AND PROVES THAT IN ORDER TO BUY A HIGHLY

DESIRABLE PRODUCT HE WAS ALSO FORCED TO BUY A PRODUCT THAT HE DIDN'T WANT, THE TIED AND THE TYING PRODUCT.

SO IN TYING CASES, THE PRODUCT THAT HE'S FORCED TO BUY IS ONE THAT HE DOESN'T WANT BY DEFINITION. HE'S COERCED, HE'S FORCED INTO BUYING THE PRODUCT THAT HE DOESN'T WANT IN ORDER TO BUY THE PRODUCT THAT HE DOES WANT.

HERE WHAT IS WRONG WITH THIS CASE RIGHT FROM THE OUTSET IS THAT THEY'RE SAYING THAT THE PRODUCT THAT ALL OF THEIR CLASS MEMBERS, ALL CONSUMERS HAVE BEEN FORCED TO BUY IS AN IPOD, ONE OF THE MOST POPULAR PRODUCTS IN THE COUNTRY.

SO THEIR BURDEN IS TO SHOW THAT SOMEBODY, THAT EVERYBODY THAT WHOEVER IS IN THEIR CLASS WAS FORCED TO BUY AN IPOD RATHER THAN BUYING AN IPOD FOR ALL OF THE REASONS THAT PEOPLE BUY IPODS, COMPLETELY UNRELATED TO THE AVAILABILITY OF MUSIC FROM APPLE'S MUSIC STORE.

I'LL GET INTO THIS IN MORE DETAIL BUT WHEN THEY TALK ABOUT THE MOORE CASE, THE NINTH CIRCUIT CASE THAT SAYS THAT YOU CAN INFER COERCION IF AN APPRECIABLE NUMBER OF PEOPLE AGREE TO AN ONEROUS TERM, A BURDENSOME TERM. THAT HAS NO APPLICATION HERE, THAT EVIDENTIARY INFERENCE OR

IMPLICATION HAS NO BEARING HERE, NO APPLICATION BECAUSE BUYING AN IPOD IS NOT A BURDENSOME TERM, IT'S NOT ONEROUS, IT'S NOT SOMETHING THAT PEOPLE WOULD DO ONLY IF THEY'RE FORCED TO DO IT.

SO THIS IDEA THAT THEY CAN JUST SORT OF WAVE THEIR HANDS AND SAY EVERYBODY IS COERCED TO BUY AN IPOD WITHOUT ANY PROOF, WITHOUT GOING PERSON BY PERSON AND WITHOUT ASKING WHY DID YOU BUY YOUR IPOD? WAS IT BECAUSE YOU WERE FORCED BECAUSE YOU HAD BOUGHT MUSIC FROM APPLE STORE, OR WAS IT FOR ANY OTHER NUMBER OF REASONS?

SO, FIRST OF ALL, WHAT IS WRONG WITH THE WHOLE CASE AND WHAT HAS, YOU KNOW, STRONG BEARING ON WHETHER THEY CAN CERTIFY A CLASS IS THAT THE PRODUCT THAT THEY HAVE SELECTED FOR THE TIED PRODUCT IS A VERY POPULAR PRODUCT.

SECONDLY, IT'S SEPARATELY AVAILABLE AND CAN BE USED SEPARATELY. AND THAT'S TRUE BOTH OF THE MUSIC AND OF THE IPOD. EVERYBODY KNOWS AND WE NOW HAVE IT IN THE RECORD IN THE DEPOSITIONS OF THE PLAINTIFFS AND THEIR EXPERT, YOU CAN WALK INTO AN APPLE STORE AND BUY AN IPOD. NOBODY EVER ASKED YOU ABOUT THE MUSIC.

NOBODY -- AND YOU CAN BUY MUSIC ON THE MUSIC STORE AND NOBODY EVER SAYS WE'RE ONLY GOING

TO SELL YOU MUSIC IF YOU AGREE TO BUY AN IPOD.

THE OTHER WAY WE KNOW SOMETHING IS WRONG WITH THIS CASE IS EACH OF THE PLAINTIFFS, ALL FIVE OF THEM, TESTIFIED THAT THEY BOUGHT IPODS VOLUNTARILY WITHOUT COERCION.

IN MOST CASES THEY HADN'T EVEN BOUGHT MUSIC FROM THE MUSIC STORE YET.

SO WE KNOW THEY WEREN'T COERCED. THEY HAVE ADMITTED THEY WEREN'T COERCED. THERE'S NEVER BEEN A TYING CASE BY A CONSUMER WHERE THE CONSUMER COMES IN AND SAYS THAT I WASN'T COERCED BUT YET I WANT TO REPRESENT A CLASS AND SAY THAT THE CLASS WAS COERCED.

IN ADDITION, THEY HAVE NOT IDENTIFIED A SINGLE PERSON WHO THEY SAY WAS COERCED ON THE THEORY THAT THEY HAVE THEORIZED HERE AND THEY HAVEN'T COME UP WITH ANY METHOD OF IDENTIFYING ANYBODY WHO THEY SAY WAS COERCED.

THE COURT: LET'S DIVIDE THE CONSIDERATION INTO WHETHER OR NOT THERE IS PROOF OF INDIVIDUAL COERCION WITH WHETHER OR NOT THERE NEEDS BE PROOF OF INDIVIDUAL COERCION AND -- BECAUSE YOU'RE RAISING BOTH.

AND I BELIEVE THAT MY PRIOR LOOK AT THIS LEAD ME TO BELIEVE THAT INDIVIDUAL COERCION IS

UNNECESSARY IF I CAN IDENTIFY COERCION AT A MARKET LEVEL.

NOW, YOU MAY TAKE ISSUE WITH THAT, BUT IT SEEMS TO ME THAT THAT IS WHAT YOU, THAT IS WHAT YOU ARE FACED WITH IN TERMS OF THE COURT'S PRIOR RULING AND ESSENTIALLY WHAT YOU'RE INVITING ME TO DO IS TO GO BACK TO THAT, REEXAMINE IT, AND TURN IT AROUND AND THEN GO TO INDIVIDUAL COERCION AS OPPOSED TO MY NEEDING TO FIND INDIVIDUAL COERCION.

MR. MITTELSTAEDT: LET ME ADDRESS THAT HEAD ON. THE COURT -- AND THIS IS ON THE MOTION TO DISMISS. SO YEARS AGO BEFORE WE HAD DEPOSITIONS, BEFORE WE WERE COMING TO THE CLASS CERT STAGE WHERE THE QUESTION IS HOW ARE THE PLAINTIFFS GOING TO PROVE THEIR CASE AND CAN THEY PROVE IT ON A CLASS BASIS?

YOUR HONOR RELIED ON THE MURPHY CASE FOR THIS CONCEPT OF MARKET LEVEL COERCION. WITH ALL RESPECT, MURPHY DOES NOT SUPPORT THAT PROVISION, THAT PROPOSAL.

MURPHY SAYS IT STARTS OFF RELYING ON JEFFERSON PARISH, THE SUPREME COURT CASE, THAT SAYS AN ESSENTIAL CHARACTERISTIC OF TYING IS FORCING THE BUYER, AND I'M PARAPHRASING, FORCING THE BUYER INTO THE PURCHASE OF A TIED PRODUCT THAT HE DIDN'T WANT.

AND THEN THE COURT SAYS, WE AGREE WITH THE DISTRICT COURT THAT SUMMARY JUDGMENT FOR DEFENDANTS WAS APPROPRIATE. AS THAT COURT STATED, THE UNCONTRADICTED EVIDENCE SHOWS THAT NO PLAINTIFF WAS FORCED TO ACCEPT A TIED PRODUCT.

SO IN THE MURPHY CASE THE COURT AFFIRMED SUMMARY JUDGMENT FOR THE DEFENDANT. THE DEFENDANT WON ON THE GROUND THAT THE PLAINTIFF HAD NOT SHOWN THAT HE WAS FORCED TO ACCEPT THE TIED PRODUCT.

THE COURT DIDN'T SAY, WELL, THAT DOESN'T MATTER AS LONG AS HE CAN PROVE MARKET LEVEL COERCION. IN THAT CASE THE COURT SAYS, YOU'RE OUT OF COURT, PLAINTIFF, BECAUSE YOU HAVEN'T PROVED COERCION.

THE PLAINTIFFS, YOUR HONOR, DO NOT TRY AND SUPPORT THE PRIOR DECISION BASED ON THE MURPHY CASE. THEY RECOGNIZE AT LEAST IMPLICITLY THAT MURPHY DOESN'T SUPPORT A CONCEPT OF MARKET LEVEL COERCION.

WHAT THEY DO IS THAT THEY GO TO THE MOORE CASE. THERE IS A PRIOR DECISION IN THE MOORE CASE AT 473 F.2D 328 THAT TALKS ABOUT THE EVIDENCE OF COERCION IN THAT RECORD.

IN MOORE ITSELF, MOORE STARTS OFF BY SAYING THAT COERCION IS REQUIRED. IT SAYS TYINGS

INVOLVE A SELLER'S REFUSAL TO SELL ONE PRODUCT UNLESS THE BUYER ALSO PURCHASES ANOTHER PRODUCT.

AND THEN IT SAYS, REVIEWS THE EVIDENCE OF COERCION ON THAT RECORD, AND THEN IT SAYS, "COERCION MAY BE IMPLIED FROM A SHOWING THAT AN APPRECIABLE NUMBER OF BUYERS HAVE ACCEPTED BURDENSOME TERMS."

AND THIS IS WHAT I WAS REFERRING TO BEFORE. IN ORDER TO GET THE BENEFIT OF AN INFERENCE THAT THERE'S COERCION, THEY HAVE TO SHOW THAT AN APPRECIABLE NUMBER OF BUYERS ACCEPTED BURDENSOME TERMS.

BUT BUYING AN IPOD IS NOT A BURDENSOME TERM. ONE CANNOT INFER FROM THE MERE FACT THAT SOMEBODY BUYS AN IPOD THAT THEY WERE COERCED INTO DOING THAT AND THAT WAS TRUE WHETHER IT'S AN INDIVIDUAL OR WHETHER YOU LOOK AT ALL INDIVIDUALS.

THE COURT: WELL, YOU STATE THAT BUYING AN IPOD IS NOT A BURDENSOME TERM BUT AM I TO SIMPLY ACCEPT THAT AT THIS POINT?

MR. MITTELSTAEDT: YOUR HONOR, IF I COULD HAND UP A HANDOUT THAT WILL ADDRESS THAT ISSUE.

THIS FIRST CHART SUMMARIZES THE EVIDENCE IN THE RECORD AND SOME OF IT IS CONFIDENTIAL SO I'M NOT GOING TO SAY IT OUT LOUD. BUT WHAT WE KNOW

FROM THE DATA IS THAT A MAJORITY OF IPOD USERS EITHER RECEIVE THEIR IPOD AS A GIFT, SO THEY WEREN'T COERCED, OR THE PERSON BUYING IT WASN'T COERCED OR THEY NEVER BOUGHT MUSIC FROM APPLE'S MUSIC STORE SO THEY COULDN'T HAVE BEEN COERCED BY THAT.

AND AT PAGE 6 OF OUR BRIEF WE SET FORTH THE DATA ON THAT, BUT IT'S A SIZEABLE PERCENTAGE OF IPOD PURCHASERS JUST NEVER GO TO THE MUSIC STORE. SO THEY COULDN'T HAVE BEEN COERCED UNDER THE PLAINTIFFS' THEORY, OR THEY BOUGHT THE IPOD BEFORE BUYING ANY MUSIC FROM THE MUSIC STORE, SO THEY COULDN'T HAVE BEEN COERCED, OR THEY HAVE VERY SMALL ELEMENTS OF ITUNES MUSIC ON THEIR IPOD.

SO UNDER THEIR LOCK-IN THEORY IT DOESN'T WORK BECAUSE THE MAJORITY OF THE MUSIC ON AN IPOD COMES FROM SOURCES OTHER THAN THE MUSIC STORE, NOTABLY A PERSON'S CD COLLECTION.

SO WHAT WE KNOW IS THAT A LOT OF PEOPLE BOUGHT IPODS EVEN BEFORE THE MUSIC STORE WAS LAUNCHED. YOU KNOW, IT DIDN'T COME ON THE SCENE UNTIL 18 MONTHS AFTER IPODS HAD BEEN INTRODUCED AND WERE SELLING.

WE KNOW THAT FIVE OUT OF THE FIVE PLAINTIFFS ADMIT THEY WEREN'T COERCED. THEY BOUGHT

IPODS IN THESE CIRCUMSTANCES.

AND AS I SAY, THERE'S NEVER BEEN A CONSUMER CLASS ACTION WHERE IT WAS ADMITTED BY THE NAMED PLAINTIFFS THAT THERE WASN'T ANY COERCION.

SO THEY DON'T GET THE BENEFIT OF AN INFERENCE THAT JUST BECAUSE YOU BUY AN IPOD YOU WERE COERCED TO DO IT, BECAUSE AS I SAY, A MAJORITY OF IPOD USERS COULDN'T POSSIBLY HAVE BEEN COERCED. AND THE PLAINTIFFS RECOGNIZE THAT.

AND SO WHAT THEY DO, AND THIS IS ON THE SECOND PAGE, THEIR EXPERT COMES UP WITH A LIST OF CHARACTERISTICS OF THE PERSON THAT THEY SAY IS COERCED.

AND HERE'S WHAT ACCORDING TO THEIR EXPERT THEY HAVE TO FIND. FIRST OF ALL, THE PERSON HAS TO BUY ENOUGH MUSIC FROM ITUNES THAT IT MATTERS;

THEN THEY HAVE TO WANT TO PLAY IT ON A PORTABLE PLAYER, A PORTABLE DIGITAL PLAYER;

AND THEN THEY WANT TO -- THEY HAVE TO PREFER AN IPOD COMPETITOR, RATHER THAN AN IPOD;

AND THEN THEY HAVE TO SHOW THAT THEY DON'T KNOW HOW TO BURN AND RIP THE MUSIC BECAUSE IT IS ADMITTED ON THIS RECORD THAT BY BURNING AND THEN RIPPING THE MUSIC, YOU CAN PLAY ITUNES MUSIC ON A COMPETING PLAYER.

IN AN ADDENDUM TO OUR OPPOSITION BRIEF, YOUR HONOR, WE SET FORTH SOME SCREEN SHOTS THAT SHOW HOW THAT PROCESS OF BURNING AND RIPPING WORKS.

AND THE PLAINTIFFS HAVE ADMITTED THAT A CONSUMER CAN MAKE COPIES OF THE RECORDINGS YOU GET FROM ITUNES MUSIC STORE AND READ THEM BACK INTO A PERSONAL COMPUTER AS DRM FREE FILES. THAT'S QUOTED AT FOOTNOTE 8 OF OUR BRIEF.

AND THEN NOLL, THEIR EXPERT, SAYS THAT THE MECHANISM TO PLAY ITUNES FILES ON COMPETING PLAYERS IS TO DO AN ACTUAL OR A VIRTUAL BURN OF THE CD AND THEN REPLAY IT.

AND THE PLAINTIFFS HAVE ADMITTED THAT IT'S EASY TO DO THAT. AND AT PAGE 9 OF OUR BRIEF, WE SET FORTH THE DEPOSITION TESTIMONY WHERE THEY ADMIT IT TAKES UNDER A MINUTE TO DO THAT. THEY KNOW HOW TO DO IT. THEY DO IT FREQUENTLY. AND THE FIRST PLAINTIFF, MR. SLATTERY, ADMITTED THAT BY BURNING AND RIPPING, HE CAN PLAY COMPETING -- HE CAN PLAY ITUNES MUSIC ON COMPETING DEVICES.

AND I ASKED HIM, AND BURNING AND RIPPING IS A PROCESS THAT YOU HAVE DONE NUMEROUS TIMES? OH, YES, MANY.

AND SO ALL THEY HAVE TO DO IS PUT A BLANK CD IN THEIR COMPUTER, HIT THE BURN DISK ICON IN

ITUNES AND IT BURNS THE MUSIC, COPIES THE MUSIC TO A CD, AND THEN THEY JUST DRAG IT BACK TO THEIR MUSIC LIBRARY AND THEY CAN PUT IT ON ANY COMPETING PLAYER THAT THEY WANT TO.

AND AS I SAY, APPENDIX 2 TO OUR OPPOSITION SETS FORTH THAT PROCESS.

SO WHAT THE PLAINTIFFS SAY IS THAT THEY ACKNOWLEDGE THAT IF YOU BURN AND RIP AND KNOW HOW TO DO IT, THEN YOU'RE NOT UNDER THEIR THEORY COERCED. YOU'RE NOT LOCKED IN. YOU CAN PLAY ITUNES MUSIC ON A COMPETING PLAYER.

SO THE OTHER ELEMENT FOR THEIR COERCED CONSUMERS IS THAT THIS PREFERENCE FOR A COMPETING PLAYER HAS TO BE NOT STRONG ENOUGH TO JUSTIFY THIS SMALL AMOUNT OF TIME AND EFFORT IT TAKES TO DO THE BURNING AND RIPPING BECAUSE IF YOU REALLY WANT A COMPETING PLAYER, THEN YOU'RE GOING TO TAKE, YOU KNOW, THE MINUTE OR LESS IT TAKES TO DO THIS EASY STEP OF BURNING AND RIPPING.

AND ONLY IF THEY MEET ALL OF THOSE REQUIREMENTS COULD THEY SAY THAT THEY'RE FORCED TO BUY AN IPOD.

WELL, WHAT IS THE SIGNIFICANCE OF ALL OF THAT?

FIRST OF ALL, THE PLAINTIFFS THEMSELVES

DON'T MEET THOSE CRITERIA. THEY HAVEN'T FOUND ANYBODY WHO DOES. THEY HAVEN'T PROPOSED ANY CLASS WIDE METHOD OF IDENTIFYING ANYBODY WHO FITS INTO THAT CATEGORY.

THEY CERTAINLY HAVEN'T NARROWED THE CLASS TO THESE TYPES OF PEOPLE AND THE REASON THEY HAVEN'T DONE ANY OF THAT IS THAT THEY RECOGNIZE THE ONLY WAY TO DETERMINE IF ANYBODY FITS INTO THIS SET OF CRITERIA IS TO GO INDIVIDUAL BY INDIVIDUAL.

SO THEY COME BACK AND SAY, WELL, MOORE SAYS THAT WE CAN JUST INFER THAT PEOPLE ARE COERCED. WELL, NOT UNDER THEIR THEORY. YOU CAN'T INFER, JUST BECAUSE SOMEBODY HAS AN IPOD, THAT THEY MEET THESE CRITERIA. THE ONLY WAY TO DO THIS IS TO GO INDIVIDUAL BY INDIVIDUAL. AND THAT'S WHY, YOUR HONOR, WHEN YOU LOOK AT THE TYING CASES, IN ANTITRUST CASES, YOU KNOW, PRICE FIXING CASES, COURTS OFTEN CERTIFY CLASSES BUT THAT'S NOT TRUE IN TYING CASES.

THE PARTIES CITED ABOUT 20 TYING CASES WHERE A CLASS WAS REQUESTED IN THE VARIOUS BRIEFS.

IN 11 OF THOSE, THE COURTS DENIED CLASSES. AND IN THE NINTH CIRCUIT IN THE DISTRICT COURTS, THE PERCENTAGE IS ABOUT THE SAME. AND THE KRELL CASE IN THE NINTH CIRCUIT IS A GOOD EXAMPLE.

IN THAT CASE THE COURT CERTIFIED SOME CLAIMS AND REFUSED TO CERTIFY OTHER CLAIMS.

AND THE DIFFERENTIATING FACTOR IN THESE TWO LINES OF CASES AND IN KRELL ITSELF IS THAT IF THERE IS A UNIFORM CONTRACTUAL REQUIREMENT THAT SAYS THAT I'M NOT GOING TO SELL YOU PRODUCT A UNLESS YOU BUY PRODUCT B, AND I'M NOT GOING TO SELL THE PRODUCT SEPARATELY, THEN THE COURTS FIND THAT THERE'S A UNIFORM CLASS WIDE METHOD OF PROOF.

THE COURT: NOW, I AGREE WITH A LOT OF WHAT YOU'RE TELLING ME, BUT THERE IS SOME PARTS OF WHAT I UNDERSTAND ABOUT THIS CIRCUMSTANCE THAT YOU'RE NOT ADDRESSING AND IT HELPS YOUR ARGUMENT IF YOU WOULD PAY ATTENTION TO THAT.

AND THAT IS THAT ANTITRUST LAW EVOLVED AS THE SOCIETY HAS EVOLVED AND INDUSTRIES AND TECHNOLOGIES AFFECTED BY IT BRING DIFFERENT PROBLEMS TO BEAR. HERE WE LIVE IN A WORLD TODAY THAT IS VERY DIFFERENT THAN WHAT EXISTED THEN THE DECISIONS THAT ARE BEING CITED TO ME AND ACROSS VARIOUS MARKETS THE PARAMETERS THAT THE COURTS SHOULD USE TO JUDGE COERCION CAN CHANGE.

WE EXIST IN A WORLD TODAY WHERE I NOTICE THAT ONE BULLET POINT YOU HAVE NOT PUT ON YOUR SLIDE IS THAT THERE ARE AN APPRECIABLE NUMBER OF

CONSUMERS WHO UNDERSTAND THE RELATIONSHIP BETWEEN THE DIGITAL MUSIC MARKET AND DIGITAL MUSIC PLAYERS AND CHOOSE TO PURCHASE PRODUCTS BASED UPON THAT LEVEL OF UNDERSTANDING.

AND DO I UNDERSTAND YOU TO DENY THAT THERE ARE A GROUP OF PURCHASERS WHO APPRECIATE THAT APPLE HAS A LARGE MARKET IN DIGITAL MUSIC IN ITS ITUNES STORE AND WHO WOULD WISH TO PURCHASE THAT MUSIC UNENCUMBERED BY A REQUIREMENT THAT THEY DOWNLOAD IT TO A DISK BEFORE THEY COULD THEN DOWNLOAD IT TO A PLAYER AND WHO WOULD WISH TO SIMPLY DOWNLOAD IT DIRECTLY TO A PLAYER BUT FIND THAT THEY CAN'T DO THAT?

WE ARE A SOCIETY OF CONVENIENCE. IF GIVEN THE CHOICE BETWEEN A GAS STATION WHERE YOU COULD BUY YOUR GAS WITHOUT HAVING TO GO INSIDE BY SIMPLY SLIDING A CARD WITH A HIGHER PRICE THAN ONE THAT HAS A CHEAPER PRICE IF YOU GO INSIDE TO SOMEONE AND TALK TO THEM AND DEAL WITH THEM, CONSUMERS ARE ONES WHO MIGHT TAKE THE FASTER COURSE OUT OF HABIT.

AND SO THE MERCHANTS OF THE WORLD KNOWING THAT PROCLIVITY CAN TAKE ADVANTAGE OF IT AND ONE OF THE WAYS AS I UNDERSTAND APPLE HAS TAKEN ADVANTAGE OF THAT IS TO SAY THAT IF WE MAKE A PLAYER WHICH

CAN ONLY DIRECTLY DOWNLOAD FROM THE INTERNET MUSIC CALLED THE IPOD AND NO OTHER PLAYER CAN DO THAT, AND WE SET UP OUR MUSIC IN A WAY THAT IT CAN ONLY DOWNLOAD DIRECTLY TO AN IPOD, CONSUMERS WILL PURCHASE THAT PRODUCT BECAUSE OF THEIR PROCLIVITY FOR THAT FAST AND CONVENIENT WAY OF DOING IT.

DO YOU DISAGREE WITH ANYTHING THAT I HAVE JUST SAID?

MR. MITTELSTAEDT: YES AND NO. THE QUESTION IS THAT IT'S NOT APPLE TAKING ADVANTAGE OF SOMETHING THAT IT'S CREATING ITSELF. THIS DOESN'T GO DIRECTLY TO YOUR --

THE COURT: I DIDN'T SAY APPLE CREATED IT. TOOK ADVANTAGE OF IT AS A PROCLIVITY IN HUMAN NATURE.

MR. MITTELSTAEDT: LET ME ADDRESS THAT AND IT'S CLEAR AND EVERYBODY AGREES THAT THE REASON THAT MUSIC STORES USE DRM, ANTI-PIRATE SOFTWARE IS BECAUSE THE RECORD LABELS REQUIRE IT.

THE COURT: AND I ACKNOWLEDGE THAT WHEN I WAS SPEAKING WITH YOUR OPPONENT.

MR. MITTELSTAEDT: AND IT'S ALSO TRUE AND THIS IS A NEW FACT THAT PLAINTIFFS' EXPERT HAS ACKNOWLEDGED THAT THERE'S NOTHING WRONG WITH APPLE USING ITS OWN PROPRIETARY SOFTWARE. HE SAID IT

WOULD BE STUPID TO PROHIBIT THAT, STUPID IS HIS WORD, BECAUSE IT WAS THWART INNOVATION. SO HE'S ON BOARD WITH APPLE USING ITS OWN SOFTWARE RATHER THAN MICROSOFT'S, FOR EXAMPLE.

THE COURT: AND I HOPE I HAVE NOT SAID ANYTHING CONTRARY TO THAT. I THINK APPLE HAS DISTINGUISHED ITSELF AS A COMPANY BY THAT VERY FREEDOM.

MR. MITTELSTAEDT: SO TO GET TO YOUR HONOR'S QUESTION, LET'S ASSUME THAT THERE ARE PEOPLE OUT THERE WHO BOUGHT IPODS BECAUSE THEY WORK WELL WITH THE ITUNES MUSIC STORE AND WORK BETTER AND DON'T TAKE THAT EXTRA MINUTE THAN A COMPETING PLAYER.

THE COURT: YOU CALLED IT A MINUTE. I'LL LET YOU GO FOR NOW, BUT I'M AFRAID I DON'T AGREE WITH YOU THAT IT'S A MINUTE.

MR. MITTELSTAEDT: WELL, IT'S A MINUTE OF THE USER'S TIME. YOU KNOW, THE COMPUTER TAKES LONGER. I CAN SHOW YOUR HONOR HOW TO DO IT IN A MINUTE.

THE COURT: WELL, YOU SEE -- BUT THAT'S NOT THE ISSUE BUT GO AHEAD.

MR. MITTELSTAEDT: THE ISSUE, I THINK, YOUR HONOR, IS WHETHER THIS IS SOMETHING THAT CAN

BE PROVED ON A CLASS WIDE BASIS OR WHETHER IT REQUIRES INDIVIDUAL PROOF.

THE COURT: THAT I THINK IS THE ISSUE. AND SO THE QUESTION THAT YOU'RE ASKING ME TO RECONSIDER IS WHETHER OR NOT THE MARKET LEVEL COERCION IS PERMISSIBLE IN THIS CASE, AND I'M WILLING TO THINK ABOUT THAT MORE BECAUSE I DO THINK THAT THAT IS AN IMPORTANT ISSUE TO ANSWER.

BUT IF I ANSWER THAT IT IS PERMISSIBLE, DO YOU HAVE AN ARGUMENT THAT THERE IS NO MARKET LEVEL COERCION?

MR. MITTELSTAEDT: THE ARGUMENT AT THAT POINT IS HOW ARE THEY GOING TO PROVE MARKET LEVEL COERCION? THEY NEED TO COME UP WITH A METHOD TO PROVE THIS ON A CLASS WIDE BASIS AND THEY HAVEN'T SUGGESTED ANY.

IT'S, YOU KNOW, WHETHER IT'S INDIVIDUAL --

THE COURT: I THINK BY DEFINITION, MARKET LEVEL COERCION IS CLASS WIDE.

MR. MITTELSTAEDT: WELL, BUT HOW DO THEY PROVE COERCION?

IF I'M RIGHT THAT THE ELEMENTS OF THEIR COERCED CONSUMER ARE AS SET FORTH HERE ON CHART NUMBER 2, AND LET'S ADD TO IT WHAT I THINK IS

IMPLICIT AND WHAT WAS SUGGESTED BY YOUR HONOR THAT YOU HAVE TO KNOW THAT IF YOU BURN AND RIP, THEN YOU CAN PLAY THE MUSIC ON A COMPETING PLAYER, LET'S ADD THAT. THAT'S ANOTHER INDIVIDUAL ISSUE.

AND IN ORDER TO PROVE THAT I WAS COERCED OR IN ORDER TO PROVE THAT, YOU KNOW, THE MARKET WAS COERCED. AND AGAIN, THE MARKET IS JUST A BUNCH OF INDIVIDUALS.

AND THERE'S -- YOU KNOW, IF YOU CAN'T PROVE THAT I WAS COERCED WITHOUT ASKING ME AND EXPLORING MY CIRCUMSTANCES, YOU CAN'T GET AWAY FROM THAT. THE PLAINTIFFS CAN'T GET AROUND THAT BY JUST SAYING, WELL, WE'RE NOT GOING TO LOOK AT INDIVIDUALS. WE'RE GOING TO LOOK AT EVERYBODY AS A GROUP BECAUSE WHEN YOU LOOK AT EVERYBODY AS A GROUP, YOU STILL HAVE TO FIND OUT, YOU KNOW, WHY DID YOU BUY YOUR IPOD? WERE YOU HAPPY TO BUY YOUR IPOD?

I MEAN, SOME PEOPLE BUY AN IPOD BECAUSE IT WORKS WELL WITH THE MUSIC STORE AND THEY'RE DELIGHTED AND THEY WOULD NEVER BUY A COMPETING PLAYER EVEN IF IT WAS AS EASY TO USE WITH THE MUSIC STORE AS THE IPOD BECAUSE THE IPOD IS A REALLY GREAT DEVICE.

SAME REASON ON CHART NUMBER 1. PEOPLE

BUY AN IPOD WITHOUT REGARD TO THE MUSIC STORE.

SO YOU NEED TO ASK INDIVIDUAL BY INDIVIDUAL AND THAT'S WHY, YOU KNOW, I'M NOT SAYING TYING LAWS SHOULDN'T KEEP UP WITH THE TIMES BUT AN ESSENTIAL ELEMENT OF TYING LAW AND CLASS CERTIFICATION IS CAN YOU PROVE IT ON A CLASS WIDE BASIS AND THEY DON'T HAVE A METHOD FOR DOING THAT, ESPECIALLY IF YOU NEED INDIVIDUAL COERCION, BUT EVEN IF YOU CALL IT MARKET COERCION, IT'S STILL A GROUP OF INDIVIDUALS.

YOUR HONOR, LET ME JUST HIT TWO OTHER POINTS QUICKLY. IT'S NOT RIGHT THAT COERCION IS OUR ONLY ARGUMENT AS AN INDIVIDUAL ISSUE. AS COUNSEL RECOGNIZES THIS NET OVERCHARGE IS ALSO A REASON THAT THEY DON'T RECOGNIZE THAT THEY ADDRESSED IT. BUT WE SAY THE NEED TO PROVE PROOF OF INJURY OR THE FACT OF DAMAGE IN THE NINTH CIRCUIT THAT NEEDS TO BE PROVED IN A TYING CASE ON A PACKAGE BASIS. AND CHART NUMBER 7 SUMMARIZES THE LAW ON THAT.

AND THE BASIC IDEA, AS SET FORTH BY THE FREELAND CASE, THE AT & T CASE IN THE SOUTHERN DISTRICT OF NEW YORK, IF A TIE CAUSES A BUYER TO PAY MORE THAN THE MARKET PRICE FOR THE TIED PRODUCT, THE BUYER IS MOST LIKELY PAYING LESS THAN

THE PRICE THAT THE SELLER COULD OTHERWISE CHARGE FOR THE TYING PRICE.

IN OTHER WORDS, THE PRICE ON THE FIRST PRODUCT IS LOWER AND THAT'S BASIC ECONOMIC THEORY FOR THE REASONS SET FORTH IN THE FREELAND CASE.

FREELAND DENIES CLASS CERTIFICATION BECAUSE THE PLAINTIFF WAS UNABLE TO IDENTIFY A METHOD TO DEMONSTRATE THAT THAT HAD NOT HAPPENED.

AND THE REASON THAT'S IMPORTANT IS A CONSUMER IS NOT DAMAGES, IS NOT INJURED IF, IN FACT, THERE'S BEEN A LOWERING OF THE PRICE ON THE MUSIC WHICH IS OFFSET IN ANY INCREASE IN THE PRICE OF THE IPOD. THAT'S THE LAW OF THE NINTH CIRCUIT IN THE SIEGLE CASE AND THE ELEVENTH CIRCUIT CASE WE CITE THERE IN THE BOTTOM BULLET SHOWS THAT. AND IT INTERPRETS AND APPLIES THE NINTH CIRCUIT SIEGLE RULE.

THE COURT: WELL, I WANT TO LEARN A LOT MORE ABOUT THAT. IN OTHER WORDS, IF THE TIED -- IF A TIE CAUSES A BUYER TO PAY MORE THAN THE MARKET PRICE FOR THE TIED PRODUCT, THE BUYER IS MOST LIKELY PAYING LESS THAN THE PRICE THE SELLER COULD PROFITABLY CHARGE.

SO THAT IS -- IS THAT MORE OR LESS THAN MARKET FOR THE TYING PRODUCT?

MR. MITTELSTAEDT: LESS, LESS.

THE COURT: LESS THAN MARKET?

MR. MITTELSTAEDT: YES. AND THE IDEA IS THAT ON DAY ONE YOU'RE SELLING THE FIRST PRODUCT.

THE COURT: BUT HOW DOES THAT FOLLOW THERE'S NO DAMAGE? WHAT IF YOU REDUCE IT BY A NICKEL AND SOMETHING ELSE IS SOLD AT A PREMIUM, HOW DOES THAT MEAN THAT THERE IS NO DAMAGE?

MR. MITTELSTAEDT: YEAH, IT DEPENDS ON THE SIZE OF THE OVERCHARGE AND THE SIZE OF THE -- THE SIZE OF THE OVERCHARGE AND THE SIZE OF THE UNDERCHARGE IF YOU WILL.

THE COURT: RIGHT.

MR. MITTELSTAEDT: AND THE RELATIVE NUMBER OF UNITS THAT YOU BUY OF EACH.

THE COURT: YES.

MR. MITTELSTAEDT: AND SO IN THE VISA CASE THE PLAINTIFFS' EXPERT CAME IN AND SAID THAT THERE'S NO UNDERCHARGE ON THE FIRST PRODUCT. AND SO THE COURT SAID, OKAY, WE DON'T HAVE A PROBLEM WITH A NET OVERCHARGE.

AND HERE WHEN I ASKED PROFESSOR NOLL, WHAT ABOUT THE PRICE OF MUSIC, WAS THAT LOWERED? AND HE SAID HE HASN'T STUDIED IT, HE DOESN'T PROPOSE TO STUDY IT AND HE'S NOT GOING TO OFFER AN

OPINION ON THAT.

SO THE BURDEN ON THE PLAINTIFFS IN THE NINTH CIRCUIT AND THE ELEVENTH CIRCUIT IS TO SHOW THAT THERE WAS A NET OVERCHARGE TAKING INTO ACCOUNT, IN OUR CASE, THE AMOUNT OF MUSIC THAT AN INDIVIDUAL CONSUMER BOUGHT, THE AMOUNT OF THE UNDERCHARGE ON THAT, AND COMPARED WITH THE NUMBER OF IPODS THAT THE PERSON BOUGHT AND THE OVERCHARGE ON THAT.

THE COURT: WHY SHOULD I DEAL WITH THIS AT THE CLASS CERTIFICATION?

MR. MITTELSTAEDT: WELL, FOR THE VERY REASON, YOUR HONOR, THAT THE PLAINTIFFS DON'T DEAL WITH IT.

THE REASON THEY DON'T DEAL WITH IT IS THAT THE ONLY WAY TO ESTABLISH THIS FACT OF INJURY IN A REGIME WHERE THE NET OVERCHARGE MUST BE SHOWN ON A PACKAGE BASIS IS TO GO CONSUMER BY CONSUMER.

IT RAISES INDIVIDUAL QUESTIONS, WHICH IS WHAT THE FREELAND CASE HELD AND THAT'S WHY FREELAND DENIED CERT. THE PLAINTIFFS RECOGNIZE THAT BECAUSE THE RELATIVE AMOUNT OF PURCHASES MATTERS IN THIS NET OVERCHARGE APPROACH, YOU HAVE TO GO INDIVIDUAL BY INDIVIDUAL TO SEE WHETHER THEY BOUGHT ENOUGH MUSIC TO MAKE UP FOR THE OVERCHARGE ON THE IPOD.

THAT'S AN INDIVIDUAL QUESTION.

THERE'S NO CLASS WIDE WAY TO DO IT OR AT LEAST THEY HAVEN'T PROPOSED ANY. AND THAT'S WHY AS I SAY PROFESSOR NOLL JUST SAYS I'M NOT GOING TO WORRY ABOUT THAT.

THE SECOND ARGUMENT ON FACT OF DAMAGES LEADS TO THE SAME CONCLUSION. THE PLAINTIFFS AGREE THAT AT LEAST ONE WAY OF PROVING TYING DAMAGES IS TO LOOK AT THE DIFFERENCE OF PRICE BETWEEN THE IPOD YOU WERE FORCED TO BUY AND THE COMPETING PLAYER YOU WANTED TO BUY.

THAT'S WHAT THE LESSIG CASE DOES, AND THAT'S WHAT THE GRAY CASE ALSO CITED DOES AND THAT'S A RELATIVELY STRAIGHTFORWARD METHOD OF PROVING DAMAGES.

THEY DON'T DO THAT. AND THE REASON THEY DON'T DO THAT IS THAT, TOO, RAISES INDIVIDUAL QUESTIONS.

AS SET FORTH IN OUR PREVIOUS ORDER TO PROVE THAT, YOU HAVE TO GO INDIVIDUAL BY INDIVIDUAL SAYING WHAT PLAYER DID YOU WANT TO USE AND DID YOU WANT TO BUY AN IPOD AND WHAT WAS THE DIFFERENCE IN PRICE AND THAT RAISES AN INDIVIDUAL QUESTION AND SO THEY DON'T DO THAT.

THAT'S ANOTHER REASON WHY THE CLASS --

WHY THIS MOTION SHOULD NOT BE GRANTED. IT SHOULD BE DENIED BECAUSE THEY HAVE IN ESSENCE FORFEITED, GIVEN UP, NOT PURSUED THAT RELATIVE STRAIGHTFORWARD METHOD OF PROVING DAMAGES FOR AN INDIVIDUAL.

AND IF THERE'S ANYBODY OUT THERE IN THE WORLD, AND AGAIN, THEY HAVEN'T IDENTIFIED ANYBODY THAT MEETS ALL OF THESE CRITERIA. THAT PERSON WOULD WANT TO COME IN AND HAVE A RELATIVELY SIMPLE CASE AND SAY, HERE'S MY MEASURE OF DAMAGES. IT'S THE DIFFERENCE BETWEEN THE REAL, THE SANSA, THE WHATEVER I WANTED TO BUY AND THE IPOD. AND THEY DON'T DO THAT.

AND FINALLY, LET ME ADDRESS THEIR SECTION 2 CLAIM. IN THE FREELAND CASE FOOTNOTE 16 THE COURT SAYS THAT WHERE YOU HAVE TYING PRACTICES AND THEY'RE MOST REGULARLY CHALLENGED AS TYING CLAIMS WHEN THE CONDUCT AT ISSUE IS REALLY ALLEGED TO BE A TYING CLAIM, IT'S FROM THE TYING CASE LAW THAT GUIDANCE MUST BE SOUGHT IN AN ATTEMPT TO EVALUATE THE INJURY CLAIMED BY THE PLAINTIFFS.

AND THEN THEY SAY THE PRINCIPLES GLEANED FROM THOSE CASES ARE EQUALLY APPLICABLE TO THE NON-TYING CLAIMS WHEN THE BASIC ALLEGATION GOES TO TYING.

AND THAT'S WHAT IS GOING ON HERE. THEY

CAN'T -- TO THE EXTENT THAT THEY HAVE PROBLEMS WITH INDIVIDUAL PROOF FOR THEIR TYING CLAIM, THEY CAN'T GET RID OF THAT SIMPLY BY SAYING, OKAY, WE'RE NOT GOING TO CALL IT TYING OR COERCIVE. WE'RE GOING TO CALL IT EXCLUSIONARY.

BECAUSE WHEN THEY'RE -- IN ORDER TO HAVE A SECTION 2 CLAIM FOR EXCLUSIONARY CONDUCT ON THE FACTS THAT THEY'RE GOING ON HERE OR ON THE THEORY, THEY HAVE TO SHOW THAT CONSUMERS WERE COERCED INTO DOING SOMETHING THAT THEY OTHERWISE WOULDN'T DO AND THEREBY EXCLUDED COMPETITION OR EXCLUDED COMPETITORS.

SO HOWEVER THEY PHRASE THEIR CLAIM, IT ALL GETS BACK TO WHETHER THERE WAS ANY COERCIVE EFFECT ON CONSUMERS AND WHETHER THEY WANT TO CALL IT COERCIVE TYING OR EXCLUSIONARY.

THE CASE THAT REALLY LAYS OUT I THINK THE IMPORTANCE OF THIS COERCIVE EFFECT IS THE COLBURN CASE. IT WAS JUDGE CONTI'S CASE. IT CAME AFTER MOORE.

IN THAT CASE JUDGE CONTI DENIED A CLASS SAYING THAT THE COERCIVE EFFECT, IF ANY, OF THE ALLEGED TYING AGREEMENT COULD NOT BE MEASURED ON A CLASS WIDE BASIS. IT HAD TO GO INDIVIDUAL BY INDIVIDUAL AND THIS IS AFTER MOORE AND HE SAID ON

THE FACTS OF THAT CASE, YOU NEED TO GO INDIVIDUAL BY INDIVIDUAL AND SO WE'RE NOT GOING TO CERTIFY A CLASS.

THAT CASE IN MY VIEW WOULD NOT HAVE COME OUT ANY DIFFERENTLY IF THE PLAINTIFF WOULD HAVE SAID, OKAY, LET'S NOT CALL IT COERCION. LET'S JUST CALL IT EXCLUSIONARY.

IT WOULD REQUIRE THE SAME KIND OF ANALYSIS OF WHETHER ANY CONSUMER HAD BEEN COERCED INTO BUYING AN IPOD THAT THEY DIDN'T WANT TO BUY.

FINALLY, YOUR HONOR, THE PLAINTIFFS ON THIS BURNING AND RIPPING ISSUE IN THEIR REPLY BRIEF RAISE THE QUESTION ABOUT WHETHER IT'S LAWFUL TO BURN AND RIP.

AND THEY SAID, YOU KNOW, IF IT'S NOT LAWFUL, THEN ALL OF THIS GOES AWAY AND THIS IS ONE INDIVIDUAL ISSUE THAT WOULD BE WITHDRAWN.

AT PAGE 6 OF THIS HANDOUT I SUMMARIZE THE LAW ON THAT AND, YOU KNOW, OUR VIEW IS THAT IT'S LEGAL TO BURN AND RIP AND THAT THAT'S NOT A REASON THE -- THAT'S NOT A WAY FOR THE PLAINTIFFS TO AVOID THE IMPACT OF THE AVAILABILITY OF BURNING AND RIPPING.

AND JUST TO EMPHASIZE ONE POINT, YOUR HONOR, AS WE SET FORTH IN THE BRIEF, THE PLAINTIFFS

AND THEIR EXPERTS ADMIT THAT BURNING AND RIPPING IS A VIABLE OPTION.

ONE CAN QUARREL ABOUT HOW LONG IT TAKES TO DO THAT, HOW EASY IT IS TO DO THAT, BUT THAT ONLY HIGHLIGHTS THAT IT'S AN INDIVIDUAL ISSUE.

THE PLAINTIFFS HAVEN'T COME UP WITH ANY CLASS WIDE METHOD OF SAYING NOBODY OUT THERE KNOWS HOW TO BURN AND RIP. YOU KNOW, NOBODY EVER DOES IT. IT'S NOT AN OPTION.

AND THEY COULDN'T DO THAT GIVEN THE ADMISSIONS OF THEIR OWN CLIENTS.

AND SO LET ME END WITH THIS THOUGHT AND IT'S REALLY THE WAY I BEGAN THAT THIS REALLY IS AT BOTTOM I THINK A CONTRIVED ANTITRUST CLAIM BECAUSE IT'S BASED ON APPLE USING ANTI-PIRACY SOFTWARE BECAUSE THE RECORD LABELS REQUIRE IT.

AND IT'S EQUALLY CONTRIVED OR EVEN MORE CONTRIVED TO TRY TO TURN THIS INTO A CLASS ACTION AND A CLASS ACTION NOT JUST FOR CONSUMERS BUT ALSO FOR RESELLERS. I'LL RELY ON WHAT WE SAY IN THE PAPERS ABOUT WHY THE CLASS SHOULDN'T BE CERTIFIED FOR THE RESELLERS LIKE WALMART AND TARGET AND BEST BUY. THEY'RE OBVIOUSLY A DIFFERENT CATEGORY OF PURCHASER.

THESE PLAINTIFFS, YOUR HONOR MAY RECALL, WHEN THEY FIRST MOVED FOR CLASS CERTIFICATION, IT WAS MRS. -- WHO WAS IT? I FORGET WHO THE PLAINTIFF WAS AT THAT TIME. MAYBE SLATTERY. ANYHOW, THEY MOVED FOR CLASS CERTIFICATION. IT WAS TAKEN OFF CALENDAR WHEN THE NEW COMPLAINT WAS FILED AND THEN THE COMPLAINT WAS CONSOLIDATED.

BUT THE FIRST TIME AROUND WHEN THEY MOVED FOR CLASS, THEY DIDN'T MENTION, THEY DIDN'T INCLUDE THE RESELLERS AND I THINK THAT'S BECAUSE THEY'RE OBVIOUSLY IN A DIFFERENT CATEGORY. THEY HAVE NOT ASKED FOR ANY DISCOVERY ON THE RESELLERS. AGAIN, THEY'RE IN A DIFFERENT CATEGORY. THEY'RE BUYING HUGE VOLUMES AND THEIR PURCHASING DECISIONS ARE DIFFERENT.

AND THESE PLAINTIFFS, YOU KNOW, ARE NOT TYPICAL OF RESELLERS THAT BUY MILLIONS AND MILLIONS OF IPODS.

OUR PAPER ALSO ADDRESSES THE REQUEST FOR AN INJUNCTIVE RELIEF CLASS THAT CLEARLY IS INAPPROPRIATE BECAUSE THE THRUST OF THIS CASE IS FOR DAMAGES AND SO LET ME END AS I STARTED.

WHAT IS UNUSUAL ABOUT THIS CASE AND WHAT WOULD MAKE IT UNPRECEDENTED TO CERTIFY A CLASS IS THE IPOD IS A VERY POPULAR PRODUCT. ONE CANNOT INFER THAT THE ONLY REASON ANYBODY WOULD BUY IT IS

BECAUSE THEY WERE COERCED TO DO SO. SO THIS EVIDENTIARY INFERENCE FROM MOORE SIMPLY DOESN'T WORK.

THERE'S NEVER BEEN A CLASS ACTION CERTIFIED WHERE THE ALLEGED TYING AND TIED PRODUCTS WERE SEPARATELY AVAILABLE, NOT ONLY SEPARATELY AVAILABLE BUT COULD BE USED SEPARATELY AND HERE EVERYBODY AGREES THAT ITUNES MUSIC CAN BE PLAYED ON A COMPUTER. IT CAN BE PLAYED ON AN IPOD, AND IT CAN BE PLAYED WITH AN EXTRA STEP ON ANY COMPETING PLAYER.

THERE'S NEVER BEEN A CLASS CERTIFIED IN THAT CIRCUMSTANCE BECAUSE IT OBVIOUSLY, I SAY OBVIOUSLY, TO ME IT RAISES INDIVIDUAL ISSUES ABOUT WHY SOMEBODY BOUGHT THEIR IPOD AND WHETHER THEY CAN MEET THE CRITERIA THAT THE PLAINTIFFS HAVE SET FORTH.

THERE'S NEVER BEEN A CLASS ACTION IN A CONSUMER CASE WHERE ALL OF THE PLAINTIFFS ADMIT THAT THEY BOUGHT THE ALLEGED UNWANTED PRODUCT VOLUNTARILY. THEY ADMIT THAT THEY WEREN'T COERCED.

AND, YOUR HONOR, WHEN THE COURT GOES BACK TO LOOK AT THE MOORE CASE, ANOTHER DIFFERENCE TO KEEP IN MIND IN MOORE IS MOORE WAS A CASE BROUGHT BY A COMPETITOR. AND SO THERE THE COURT WAS ASKING

THE QUESTION, HOW MUCH COERCION OF CONSUMERS DOES A COMPETITOR NEED TO SHOW IN ORDER TO PROVE A CLAIM FOR LOST PROFITS BECAUSE THEY WERE EXCLUDED FROM THE MARKET? THAT'S A MUCH DIFFERENT CIRCUMSTANCE BECAUSE THERE THE ISSUE IS HOW MUCH OF THE MARKET HAS TO BE FORECLOSED TO A COMPETITOR BY THIS TYING IN ORDER FOR THE COMPETITOR TO HAVE A CLAIM FOR LOST PROFITS.

AND SO IT'S ONE THING IN A CASE LIKE THAT TO SAY, YOU KNOW, OF COURSE A QUESTIONER DOESN'T HAVE TO SHOW THAT HE WAS COERCED AT ALL. HE'S NOT BUYING THE PRODUCT. AND SO WHATEVER THE COURT SAYS IN THAT CONTRACT DOESN'T APPLY AT LEAST DIRECTLY IN THE CASE WHERE A CONSUMER COMES IN AND THE CONSUMER IS SAYING I WANT TO RECOVER DAMAGES BUT I WASN'T COERCED.

AT PAGE 14 OF OUR BRIEF WE QUOTE FROM PROFESSOR AREDA, YOU KNOW, THE LEADING EXPERT ON ANTITRUST LAW AND FROM HIS TREATISE AND WHAT HE SAYS I THINK IS RELEVANT TO ALL OF THIS. HE SAYS THAT IF YOU WOULD HAVE PURCHASED THE TIED PRODUCT ANYWAY, SO YOU WOULD HAVE BOUGHT AN IPOD REGARDLESS OF THE RELATIONSHIP TO THE MUSIC STORE, YOU LACK STANDING TO OBTAIN DAMAGES BECAUSE YOU HAVEN'T BEEN DAMAGED BY TYING. YOU HAVEN'T BEEN COERCED TO DO

ANYTHING. YOU JUST BOUGHT THE PRODUCT, YOU WOULD HAVE BOUGHT IT ANYWAY.

AND THEN HE SAYS, THE RESULT IS THAT TYING ARRANGEMENT PURCHASER CONSUMER CLASS ACTIONS, SEEKING DAMAGES CANNOT BE CERTIFIED IF THE CLASS MIGHT INCLUDE SOME PURCHASERS WHO WOULD HAVE PURCHASED THE TIED PRODUCT IN ANY EVENT BECAUSE THAT PERSON HASN'T BEEN DAMAGED, HASN'T SUFFERED ANTITRUST INJURY. HE WOULD HAVE BOUGHT IT ANYWAY.

HERE, AS I HAVE SAID, THE PLAINTIFFS HAVE NOT TRIED TO NARROW THEIR CLASS TO THE PEOPLE WHO MEET THESE CHARACTERISTICS.

THE COURT: I APPRECIATE YOUR ARGUMENT, AND I DO NEED TO HAVE YOU BRING IT TO A CLOSE MAINLY BECAUSE THERE ARE A COUPLE OF ISSUES THAT I NEED TO DEAL WITH BEFORE I CAN MOVE INTO THESE MORE ESOTERIC THEORIES THAT YOU HAVE HIGHLIGHTED FOR ME WELL ENOUGH. AND SO THANK YOU VERY MUCH.

MR. MITTELSTAEDT: OKAY. THANK YOU, YOUR HONOR.

THE COURT: COUNSEL, YOU RESERVED SOME OF YOUR TIME FOR REBUTTAL.

I APOLOGIZE TO THOSE WHO ARE HERE FOR OUR 10:00 O'CLOCK HEARING, BUT I NEED TO GIVE COUNSEL TIME FOR REBUTTAL AND WE'LL BE DONE IN ABOUT TEN

MINUTES.

MS. SWEENEY: THANK YOU, YOUR HONOR, I WILL BE BRIEF. MR. MITTELSTAEDT'S ARGUMENT FOCUSSED PRIMARILY ON THE MERITS ISSUES IN THIS CASE AND I JUST WANTED TO REMIND THE COURT THAT NOT ONLY IS THAT APPROPRIATE IN CLASS CERTIFICATION BUT IN THIS CASE DISCOVERY HAS BEEN BIFURCATED. WE HAVE HAD NO MERITS DISCOVERY.

SO THE QUESTION WHETHER BURNING AND RIPPING IS A VIABLE OPTION, OF COURSE WE DON'T AGREE THAT IT IS A VIABLE OPTION. THAT'S A MERITS ISSUE THAT WILL BE ADDRESSED AFTER FULL DISCOVERY.

THE QUESTION ABOUT WHETHER THERE CAN BE INTERPLAYABILITY WITHOUT VIOLATING DRM, THAT IS ANOTHER MERITS QUESTION AND WE HIGHLIGHTED IN OUR OPENING BRIEF THE STATEMENT OF SOME OF THE LABELS THAT THEY WOULD LIKE TO SEE INTEROPERABILITY.

SO OBVIOUSLY THE LABELS HAVE A DIFFERENT POINT OF VIEW THAN APPLE. THAT IS APPLE'S VIEW IS, WELL, WE HAVE TO DO IT THIS WAY BECAUSE OTHERWISE WE WOULD BE VIOLATING COPYRIGHT LAWS.

SO THAT'S ANOTHER MERITS ISSUE THAT IS RESERVED UNTIL AFTER PLAINTIFFS HAVE HAD AN OPPORTUNITY TO CONDUCT DISCOVERY.

I WOULD ALSO LIKE TO CORRECT SOME OF THE

MISSTATEMENTS THAT MR. MITTELSTAEDT MADE. HE MADE CLAIMS ABOUT FIVE PLAINTIFFS IN THIS ACTION. THERE ARE THREE PLAINTIFFS, THREE NAMED PLAINTIFFS.

PLAINTIFF SLATTERY DISMISSED HIS CLAIM. PLAINTIFF SOMERS IS A PLAINTIFF IN THE INDIRECT PURCHASER ACTION, NOT THIS ACTION.

MR. MITTELSTAEDT SAID REPEATEDLY THAT EACH OF THOSE PLAINTIFFS ADMITTED THAT HE OR SHE WAS NOT COERCED INTO BUYING AN IPOD. IN FACT, THE DEPOSITION TESTIMONY READS A LITTLE DIFFERENTLY THAN THAT.

PLAINTIFF TUCKER, WHO PURCHASED TWO IPODS, SHE PURCHASED AN IPOD AFTER HER FIRST ONE BROKE, WAS ASKED BY MR. MITTELSTAEDT, WHY DID YOU BUY THAT? AND SHE SAID BECAUSE MY FIRST ONE BROKE.

HE THEN ASKED, AND HOW DID YOU CHOOSE AN IPOD RATHER THAN SAY AN IRIVER? AND SHE ANSWERED, BECAUSE ALL OF MY MUSIC WAS ALREADY IN ITUNES AND THAT WOULD HAVE BEEN THE ONLY WAY TO KEEP MY MUSIC.

AND I MENTION THIS JUST TO SHOW THAT THERE ARE DISCREPANCIES IN THE RECORD AND THERE ARE SIMILAR TESTIMONY BY THE OTHER PLAINTIFFS BUT NONETHELESS, AS YOUR HONOR HAS RECOGNIZED, THE QUESTION IS NOT WHETHER WE CAN SHOW ON A CLASS MEMBER BY CLASS MEMBER BASIS WHETHER THERE WAS

COERCION BUT WHETHER THERE WAS COERCION AT THE MARKET LEVEL.

AND THE MURPHY CASE IS STILL GOOD LAW. IT'S TRUE THAT IN THAT CASE THE PLAINTIFF DID NOT PREVAIL BUT THE COURT STATED THE APPROPRIATE STANDARD, WHICH WAS ALSO STATED IN THE MOORE CASE WHICH WE TALKED ABOUT EARLIER.

PROFESSOR NOLL'S COMMENTS ALSO HAVE BEEN A LITTLE BIT DISTORTED IN ARGUMENT. PROFESSOR NOLL HAS IN HIS 60 PAGE REPORT, WHICH APPLE DOESN'T ADDRESS AT ANY TIME IN ITS BRIEF OR IN ARGUMENT, IN HIS REPORT HE DEVOTED A NUMBER OF PAGES TO EXPLAINING HOW AN ECONOMIST WOULD GO ABOUT DETERMINING WHETHER THERE WAS AN EFFECT ON THE MARKET, THAT IS, WHETHER THERE WAS MARKET LEVEL COERCION AND I BELIEVE THAT THE RELEVANT PAGES ARE 39 THROUGH 49. THAT'S IN EXHIBIT 1 TO MY DECLARATION.

PROFESSOR NOLL EXPLAINED IN HIS DEPOSITION THAT YOU DON'T HAVE TO SHOW THAT EACH CLASS MEMBER WAS COERCED. AND THOSE BULLET POINTS THAT MR. MITTELSTAEDT SENT UP TO THE COURT, THAT WAS AN EXAMPLE THAT PROFESSOR NOLL GAVE OF HOW SOME PEOPLE, SOME MEMBERS OF THE CLASS WERE COERCED.

AND THE QUESTION IS WHETHER ANY OF THOSE

CLASS MEMBERS WERE COERCED THAT IT HAD AN EFFECT ON MARKET POWER POSSESSED BY APPLE? IF IT APPRECIABLY ENHANCED APPLE'S MARKET POWER, THEN APPLE WAS ABLE TO INCREASE THE PRICE OF IPODS AND THEREBY INCREASE THE PRICE CHARGED TO EACH AND EVERY MEMBER OF THE CLASS.

AND THIS IS WHERE WE GO BACK TO WHAT WE SAID IN OUR EARLIER OPENING PAPERS AND THAT IS THAT APPLE HAS AN UNREMITTING POLICY. IT HAS THE TECHNOLOGICAL RESTRICTION.

IN EVERY ITUNES DOWNLOAD AND IN EVERY IPOD THEREFORE IF ENOUGH CLASS MEMBERS WERE COERCED TO EFFECT IT AT THE MARKET LEVEL, THEN EVERY CLASS MEMBER PAID AN OVERCHARGE.

APPLE CITES A BUNCH OF TYING CASES AND LOOKING, YOU JUST HAVE TO READ THE FACTS OF THOSE CASES WHERE THE COURTS DENY THE CERTIFICATION TO SEE THAT THEY'RE NOT APPLICABLE HERE.

AND THE COLBURN CASE, WHICH MR. MITTELSTAEDT MENTIONED A FEW TIMES, THE PLAINTIFF INTRODUCED EVIDENCE OF ONE CONTRACT, HIS CONTRACT AND NO OTHER EVIDENCE THAT THERE WERE SIMILARLY SITUATED PLAINTIFFS IN THE CLASS.

THERE WAS NO EVIDENCE THAT THERE WERE OTHER SIMILAR CONTRACTS.

SO THOSE CASES ARE INAPPOSITE FOR A NUMBER OF REASONS.

AND I WANT TO TAKE ISSUE WITH MR. MITTELSTAEDT'S STATEMENT THAT THE PLAINTIFFS AGREED THAT THE LESS SIGNIFICANT DAMAGES METHODOLOGY IS APPROPRIATE IN THE TYING CASE.

IN FACT, AS PROFESSOR NOLL TESTIFIED AT HIS DEPOSITION, IT'S JUST -- IT'S NOT THE CORRECT WAY TO GO ABOUT PROVING DAMAGES BECAUSE YOU HAVE TO LOOK AT THE "BUT FOR WORLD." YOU HAVE TO CONCEDE FROM AN ECONOMIST POINT OF VIEW WHAT THE MARKET WOULD LOOK LIKE IN THE ABSENCE OF THE ANTICOMPETITIVE MARKET.

AND SO IF WE WERE JUST, OF COURSE, TO SIT DOWN TODAY AND LOOK AT A COMPETING PRODUCT, THAT'S NOT THE REAL BUT FOR WORLD BECAUSE, IN FACT, THE PRICE OF THAT COMPETING PRODUCT IS AFFECTED BY THE TIE, BY THE MONOPOLISTIC CONDUCT BY APPLE.

SO IT'S NOT A REALISTIC PICTURE AND PROFESSOR NOLL TESTIFIED WHY THAT WAS NOT AN APPROPRIATE METHODOLOGY.

WITH RESPECT TO RESELLERS, WE EXPLAINED IN OUR BRIEF, WE CITED NUMEROUS CASES FOR THE PROPOSITION THAT IT'S PERFECTLY APPROPRIATE TO INCLUDE RESELLERS IN THE PLAINTIFF CLASS.

PROFESSOR NOLL EXPLAINED THROUGHOUT HIS 60 PAGE REPORT HOW HE WOULD PROPOSE DEALING WITH RESELLERS. HE STATED BOTH AT HIS DEPOSITION AND IN HIS REPORT THAT THEY MIGHT HAVE TO BE TREATED A LITTLE DIFFERENT BUT HIS METHODOLOGY TAKES THAT INTO ACCOUNT.

I'M GOING TO --

MS. SWEENEY: CUT ME OFF.

THE COURT: -- ASK YOU TO BRING YOUR ARGUMENT TO A CLOSE.

MS. SWEENEY: ALL RIGHT. I APPRECIATE YOUR INDULGENCE, YOUR HONOR. THANK YOU VERY MUCH.

THE COURT: ALL RIGHT. WELL, I MAKE THE SAME STATEMENT TO THE PLAINTIFF THAT I MADE TO THE DEFENSE AND THAT IS I HAVE BENEFITTED FROM BOTH THE BRIEFING AND THE ARGUMENT HERE ON THIS ISSUE.

THE TECHNOLOGICAL DEVELOPMENTS THAT HAVE BROUGHT US THE KIND OF DEVICES AND THE OPPORTUNITY TO USE THOSE DEVICES IN A DIFFERENT WORLD AND IN THE PAST PRESENTS DIFFERENT PROBLEMS TO THE COURT IN THE CONTEXT OF A CASE OF THIS KIND. AND SO ON THIS MOTION IT COULD BE THAT I'LL INVITE YOU BACK TO ADDRESS SOME OF THESE MATTERS.

AGAIN, BECAUSE I REGARD THIS AS A PROCESS AS OPPOSED TO AN EVENT, I DO WANT TO GO BACK AND

LOOK AT, AS I INDICATED, AGAIN, THE MARKET LEVEL COERCION ISSUE BECAUSE IT IS ONE OF THE KEYS TO WHY I WOULD BE ABLE TO CERTIFY THE CLASS IN THE WAY THAT IT IS BEING PROPOSED TO THE COURT.

BUT I HOPE THAT THAT WON'T DELAY ME TOO LONG IN GIVING YOU A DECISION ON THIS.

AND IF I NEED MORE FROM YOU, I WON'T HESITATE TO ASK.

THANK YOU BOTH VERY MUCH.

MS. SWEENEY: THANK YOU, YOUR HONOR.

MR. MITTELSTAEDT: THANK YOU, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)